Supreme Court, U.S
FILED

021052 JAN 6 2003

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

VIOLA MEDVED,

Petitioner,

v.

WORKMEN'S COMPENSATION APPEAL BOARD (ALBERT GALLATIN SERVICES)

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

PETITION FOR A WRIT OF CERTIORARI

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69pp

QUESTIONS PRESENTED FOR REVIEW

I. **Whether this Court should grant certiorari to decide whether a disabled worker's compensation claimant's constitutionally protected privacy rights were violated when her benefits were reduced by an alleged job offer which required her to make use of her home for work purposes without rent or compensation and when this use would cause disruption of her husband's quiet enjoyment of his home?**

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OPINIONS AND ORDERS BELOW

The order of the Pennsylvania Supreme Court, dated August 8, 2002, denying the Petition for Allowance of Appeal, was not reported and appears at Appendix p. 2A. The opinion and Order of the Commonwealth Court of Pennsylvania, dated November 28, 2001, is reported at 788 A.2d 447 (Pa.Cmwlth.2001) and appears at Appendix p. 4A. The Opinion and Order of the Worker's Compensation Appeal Board, dated January 9, 2001, was not reported and appears at Appendix p.22A. The Decision of the Worker's Compensation Administrative Judge granting the Petition of Albert Gallatin Services for Modification of Worker's Compensation benefits, dated April 7, 1999 was not reported and appears at Appendix, p. 32A.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the decision by the Pennsylvania Supreme Court, dated August 8, 2002, not to accept an appeal of the judgment of the Commonwealth Court of Pennsylvania entered November 28, 2001, which affirmed the decision of the Workers' Compensation Appeal Board. However, Honorable Dan Pellegrini issued a dissenting Opinion. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner claims violations of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution:

> Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment III: No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment IX: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In relevant parts, the Pennsylvania Statutes complained of provide:

77 Pa.S. §431. Every employer shall be liable for compensation for personal injury to, or for the death of each employe, by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article: ....

77 Pa.S. §512. For disability partial in character (except in the particular cases mentioned in clause (c) sixty-six and two thirds per centum of the difference between the wages of the injured employe, as defined in section three hundred and nine, and the earning power of the employe thereafter; but such compensation shall not be more that the maximum compensation payable.

77 Pa.S. §772. A workers' compensation judge designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement or an award of the department or its judge, upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed....

STATEMENT OF THE CASE

On October 14, 1997, the employer, Albert Gallatin

Services, filed worker's compensation modification and suspension petitions against the claimant, Viola Medved, alleging that she was capable of sedentary to light duty work and the employer had located appropriate work for her through a vocational expert, and lacking good faith, the claimant refused to make an effort to secure that work.

A notice of compensation payable had been issued on July 2, 1986, acknowledging a work injury to claimant's back which occurred on March 10, 1986. Her weekly disability rate was set at $260.15 based upon an average weekly wage of $390.20. A supplemental agreement was entered into dated April 2, 1988, indicating that claimant's benefits were suspended on November 1, 1986, based upon her return to work at no loss of earnings on that date. On May 12, 1990, claimant filed a Reinstatement Petition that was later withdrawn at her request on August 27, 1990.

On October 14, 1997, defendant filed Modification and Suspension Petitions alleging that claimant was capable of sedentary to light work and defendant had located appropriate work for claimant through a vocational placement expert, but claimant failed to make a good faith effort to secure that work. Claimant filed an answer denying the allegations contained in the Petition.

After hearings, testimony and the receipt of evidence, the Workers' Compensation Judge, Susan Cercone, issued a Decision and Order granting modification of claimant's benefits as of August 27, 1997, and dismissed the Suspension Petition. A copy of the Order and Decision is attached. The Workers' Compensation Judge determined that the job made available to claimant through defendant's vocational expert was within claimant's work-related physical limitations and claimant offered no valid reasons for refusing to accept the job. Following appeal, the Workers' Compensation Appeal Board affirmed the decision of Judge Susan Cercone by Order and Decision dated January 9, 2001.

A copy of the Order and Decision of the Board is attached hereto.

The matter was appealed to the Commonwealth Court of Pennsylvania. The Commonwealth Court Panel, consisting of Judges Pellegrini, Brigance Leadbetter, and Jiuliante, affirmed the Workers' Compensation Appeal Board decision by Order dated November 28, 2001. Judge Pellegrini issued a dissenting opinion on the decision. Reconsideration was requested but denied by Order dated January 28, 2002. A copy of the Order is attached hereto. A Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania Western District by Order dated August 8, 2002.

The facts of the case follow:

Claimant has been receiving compensation since July 2, 1986 as a result of a work injury to her back occurring on March 10, 1986.

The Claimant is currently 68 years of age. She is married and living with her 69 year old husband at home.

Claimant was employed at the time of her injury as a registered nurse. She testified that her injury was a pulling or cracking in her back causing pain to her lower back running down her buttocks and down her left leg. Transcript hearing, 12/12/97, p. 8 (RR 8a).[1] Although she had not had surgery for the injury, she did require hospitalization on at least two occasions. Id. It should be noted that in her testimony, the Claimant, who was representing herself without counsel at the time, proceeded to describe her injury and pain in the present tense. Id. Additionally, on several occasions she confirmed that her pain continues. Transcript,

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[1] Page numbers followed by lower case numbers designate pages of the Reproduced Record filed in Commonwealth Court of Pennsylvania.

2/27/98, pp. 11,12, (RR 27-28a). She testified that she had not recovered from her injury. 12/12/97 Transcript, p. 12, (RR 28a).

Based upon her average weekly wage of $390.20 at the time of her injury, she was receiving worker's compensation at rate of $260.15 a week.

On October 14, 1977 the employer filed petitions for modification or suspension of her benefits based on its allegation that she was capable of sedentary to light duty work and that it had located appropriate work for her, and that claimant had failed to make an effort in good faith to secure that work.

The parameters of the alleged job which was offered to the claimant were set out in the testimony of the employer's expert, Mr. Leonard Feldman. He indicated that his organization, Expediter Corporation had offered the job to the claimant. Essentially the offered job was one working for Smart Telecommunications which consisted of mainly contacting businesses by telephone and checking validity of mailing addresses, business information, or feedback on use of products by customers, and the like. Transcript, 7/10/98, pp. 10 et seq., (RR 56a). Although he characterized the position as "telecommuting" (Id., pp. 11,12, (RR 57-58a) rather than telemarketing, he did note that it could include some solicitation on behalf of the American Heart Fund. Id., pp. 15, 16, (RR 61-62a). The job would require the claimant to work in her home, would require Smart to have "reasonable and timely access for purposes of installation or service of equipment, training or removal of equipment," with Smart reserving the right to "monitor the usage of the equipment and services provided" at the residence. Employment Equipment Agreement attached to job offer. The agreement proffered by the employer was referred to in testimony and submitted directly to the Appeal Board. Transcript, 2/27/98, p. 11 (RR 27a), (Claimant's Exhibit 3, (RR 114a). The equipment could include one or more of

a telephone, fax machine, personal computer, and printer. Id.

Claimant requested that the company pay rent to her husband and her for the use of their home. Expediter indicated that rent would not be paid to her. Transcript, 7/10/98, p. 22, (RR 68a). Claimant then declined the position based upon several grounds, including the failure to pay rent for the use of the home, the failure to compensate the unpaid husband for the disruption to the quiet use and enjoyment of his household, her inability to perform the job because of her lack of attention span and concentration due to her continuing pain, and her dislike of telemarketing and solicitations that the job would entail.

Claimant had offered into evidence several medical reports from Nunziata Raschella, M.D. and Ronald E. Novak, D.C. These reports confirmed that her lower back problems and pain persisted, and that she had reduced sensation in her feet, had severe multilevel lumbar disc degeneration with spondylosis and lumbar stenosis with leg and foot paresthesia, with pain, numbness and stiffness in her left foot, leg, hip and in her spine. She was unable to take typical non-steroidal anti-inflammatories due to her history of upper GI bleeding.

Following hearing, the Worker's Compensation Judge determined that the employer had met its burden of proving that work within the claimant's mental and physical capabilities was offered to her and she did not in good faith pursue that job offer. As a result, the weekly compensation benefit was reduced to $20.17.

After hearings, testimony and the receipt of evidence, the Workers' Compensation Judge, Susan Cercone, issued a Decision and Order granting modification of claimant's benefits as of August 27, 1997, and dismissed the Suspension Petition. The Workers' Compensation Judge determined that the employer had

met its burden of proving that work within the claimant's mental and physical capabilities was offered to her and that she did not in good faith pursue that job offer since she offered no valid reasons for refusing to accept the job. As a result, the weekly compensation benefit was reduced to $20.17.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to decide whether a disabled worker's compensation claimant's constitutionally protected privacy rights were violated when her benefits were reduced by an alleged job offer which required her to make use of her home for work purposes without rent or compensation and when this use would cause disruption of her husband's quiet enjoyment of his home

As the Worker's Compensation Judge acknowledged, this case presents an issue of first impression concerning the limits to which an employee must tolerate an invasion of family privacy. Transcript hearing, 12/12/97, p. 14, (RR 14a).

In order to place the federal constitutional privacy issue into proper perspective, it is necessary to outline the current status of Pennsylvania worker's compensation law. The Pennsylvania Supreme Court in Kachinski v. WCAB (Vepco Construction Co.), 532 A.2d 374, 279-380 (Pa.1987) set forth the law concerning modifications based on attempts to return employees to work for cases arising from injuries incurred at the time of Mrs. Medved's injury:

> 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.

2. The employer must then produce evidence of a referral (or referrals) to the then open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light work, sedentary work, etc.

3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).

4. If the referral fails to result in a job then claimant's benefits should continue.

Obviously the viability of this system depends on the good faith of the participants. The referrals by the employer must be tailored to the claimant's abilities, [citation omitted] and be made in a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation. By the same token, employees must make a good faith effort to return to the work force when they are able, and their benefits can be modified for failure to follow up on referrals or for willfully sabotaging referrals. If an employee refuses a valid job offer his benefits can also be modified if he had no basis upon which to do so. Of course medical evidence which rebuts the employer's evidence of a change in condition, or indicates the unacceptability of the offered employment, can be the basis for a determination that claimant had a valid reason for refusing a job offer.

Id. (emphasis added)

In this case, it is submitted that Mrs. Medved had valid reasons for refusing the alleged job offer to her, including the failure to have rent paid to her husband and her for the use of the house and for the inconvenience caused to the household including

to the uncompensated husband. Additionally, it is submitted that an analysis of the offered job demonstrates that it was not made in good faith but was merely an attempt to avoid paying compensation.

The WCJ incorrectly determined that the claimant's "only objection to the job was some concern about privacy which was addressed in the testimony of both Mr. Feldman and Ms. Marchione." In fact, Mrs. Medved had specifically requested rent for the use of her and her husband's home which had been turned down. The proposed employer would have the benefit of not having to provide her with a normal workplace, and require the use of home space for the job. Since they would be obtaining a pecuniary benefit in not having to provide a work space and still having work accomplished for them, some rental should be due. Since there would be a disruption and change of the home environment for the husband who would not otherwise be compensated, some benefit would be due him for this same use. The failure of the proposed employer to grant the request for rent or other additional compensation is a valid reason for turning the position down. As noted above in Kachinski, if there is a valid basis for turning a job offer down, the modification petition should not be granted.

Additionally, claimant had also indicated the job would affect her relationship with her husband who indicated that he did not want this disruption of their normal home environment. Obviously, the job would have an effect on this environment and his normal everyday life in that he would be forced to hear her part of any conversations that the job required. A normal job with her going to a regular workplace would not have such an effect. These effects on claimant's privacy rights and those of her husband were not met in any way by Feldman's or Marchione's testimony.

It should also be noted that the Feldman's and Marchione's

description of limited nature of such disruptions were contradicted by the form they would require the claimant to sign to accept the job which indicated that the employer would have reasonable and timely access to the home during business hours for the purpose of installation or service of equipment, training or removal of equipment. That agreement also reserved to the employer the right to monitor the usage of the equipment and services provided at the residence. This agreement therefore required much more than the one installation visit Feldman seemed to imply would be needed. The record made it clear that the agreement was a condition for the job at the time of refusal. (RR 114a).

This unwarranted incursion on the privacy interests, particularly of the husband who is not an employee and not in any way to be compensated for the effect on his home and household, as well as of the claimant herself in terms of disruption to the home, presents serious legal policy issues.

A good analysis and summary of constitutional privacy law is outlined in detail in McKenna v. Peekskill Housing Authority, 497 F.Supp. 1217 (S.D.N.Y. 1980), which involved a challenge to a housing authority regulation requiring tenants to obtain prior approval for overnight guests and to register their visitor's arrivals and departures. The Court of Appeals for the Second Circuit found these regulations to be properly subject to a privacy challenge. McKenna v. Peekskill Housing Authority, 647 F.2d 332 (2d Cir. 1981).

The district court summarized the law as follows, 497 F.Sup at 1223-1225:

> The Supreme Court "has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." Roe v. Wade, supra, 410 U.S. at 152, 93 S. Ct. at 726; Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed.2d 510

(1965). But the constitutional concept of privacy is not coterminous with the colloquial meaning of privacy. The Court's decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.s. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937), are included in this guarantee." Roe v. Wade, supra, 410 U.S. at 152, 93 S. Ct. at 726. In addition, the right of privacy "is not unqualified and must be considered against important state interests in regulation." Id. at 154, 93 S. Ct. at 727.

Because of its flexible form, responsive to circumstances, the scope of the privacy right is difficult, if not impossible, to define, but its outlines can be sketched, its major elements identified.

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It is well established that the home and the family are two protected zones of privacy. Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 554, 54 L. Ed.2d 511 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 862-63, 97 S. Ct. 2094, 2119, 53 L. Ed.2d 14 (1977) (Stewart, J., concurring in judgment); Wisconsin v. Yoder, 406 U.S. 205, 231-33, 92 S. Ct. 1526, 1541-42, 32 L. Ed.2d 15 (1972); Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969). As a poignant illustration, the Supreme Court reached opposite results in two zoning cases because only non-related persons were affected in one, whereas in the other, members of the family would have been forbidden to live together. Compare Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed.2d 797 (1974), with Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed.2d 531 (1977).

These decisions cannot be taken, however, to signify

that any regulation of home or family is invalid. Even when a regulation touches on "that freedom of personal choice in matters of marriage and family life ... [that] is one of the liberties protected by the Due Process Clause," Cleveland Board of Educ. v. LaFleur, 414 U.S. 632, 639-640, 94 S. Ct. 791, 796, 39 L. Ed.2d 52 (1974), the Court still balances the individual's privacy against "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Moore v. City of East Cleveland, supra, 431 U.S. at 499, 97 S. Ct. at 1936; Roe v. Wade, supra, 410 U.S. at 154-55, 93 S. Ct. at 727. Thus, the Court in Moore invoked the Due Process Clause to strike down East Cleveland's zoning ordinance not simply because it affected families, but because of its "tenuous relation" to the city's "legitimate goals" of "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on East Cleveland's school system." 431 U.S. at 499-500, 97 S. Ct. at 1936. Moreover in balancing private and governmental interests, the Supreme Court gives especially close scrutiny to regulations which dictate the permissible shape of citizens' personal affairs.

In the instant case, even accepting all the modifications offered by the employer to reduce the intrusion into Medved's private residence, the offered job would still require, at a minimum, the following intrusions: (a) the permanent placement of equipment (telephones, computers, fax machine) and the repeated daily conversion of a portion of the house from regular family residential to commercial office use.

Under established Pennsylvania law, no one has the right to force a conversion of the use of one's private residence. The owner has the right to the quiet enjoyment of his personal property. Any unprivileged interference with that right is a violation of civil law

subject to a cause of action for trespass. It has specifically been held that the law recognizes a cause of action for inconvenience and discomfort caused by interference with another's peaceful possession of his or her real estate. Houston v. Texaco, Inc., 371 Pa. Super. 399, 538 A.2d 502 (1988); See also Restatement of Torts 2nd, §157, 158, 159, 160, 161.

In the absence of the consent of the owners of the house to permit the interruption of their quiet enjoyment and/or the storage of required office equipment, an actionable tort has occurred. At the very least, it constitutes a valid reason for turning down the job offer without incurring a penalty to her worker's compensation entitlement.

Here, as a condition of the proffered employment, the claimant must waive her protected right to the quiet enjoyment of her own residence. She must also waive the rights of her family members to the same entitlement. There is absolutely no legal authority to coerce the surrender of such a precious protection. No good faith bona fide offer of a job can be made without the employer making available, at their cost and expense, a place of employment.

This case is extremely important in defining the line where good faith employment offers end and bad faith attempts to defeat legitimate compensation begins. A review of the case law failed to reveal any published case that has gone so far as that suggested by the employer here. The courts have gone so far as to approve mere "make-work", but have never before maintained than an employee must surrender the quiet enjoyment of their own home without any form of compensation. There soon reaches a point when the humane purposes behind the workers' compensation law are totally forgotten. The principles put forward by the employer in this case threatens to completely destroy the legislative scheme to protect injured workers. It can be foreseen that a completely bedridden

quadriplegic will be asked to "telecommute" by triggering telephone contacts with whatever facial muscle or audio ability technology permits. To avoid such absurd results, one easy bright-line to draw exists at the doorstep to the injured employee's home. It is wrong and legally unsupported to force employees to consent to such intrusions into their family's privacy. At a minimum, a bona fide job offer would require the potential employer to provide an appropriate location or site for the proffered employment.

The appropriate balance of rights, coming down in favor of claimant's family and home privacy rights was articulated by Judge Pellegrini in his dissenting opinion (see Appendix, p. 20A):

> I recognize that a significant number of individuals work from their homes, but just because they choose to do so does not make at-home work suitable alternative employment. A significant number of individuals choose to commute great distances and work inordinate numbers of hours, but if proffered, we would not find this type of employment situation to be a suitable alternative. Unless a person had chosen to work at home prior to an injury, I would hold that any position that requires a claimant's residence to be commandeered and turned from a home into an employer's rent-free field office, thereby invading the claimant's privacy, intruding, without permission, into other household members' daily home lives and disrupting family life, can never be considered suitable alternative employment. (emphasis added)

This Court has reviewed another aspect of the Pennsylvania Worker's Compensation statute in American Manufacturer's Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977, 1432 L.Ed.2d 130 (1999). That case involved a challenge under 42 U.S.C. §1983 to private insurers who were utilizing an allegedly defective procedure, without a meaningful pre-termination hearing,

to cut off compensation benefits. The Court reversed a decision by the Third Circuit Court of Appeals and found that no state action was presented by that issue. However, the instant issue is quite different. In Sullivan, Id., the Court found that the resolution of disputed compensation payment was historically a private function. Here, what is sanctioned is not merely a short-cut to private payment, but rather a coerced intrusion or trespass into the home. The private parties here would have no ability to force entry into the privacy of the family and home without the government's sanction. Historically, the government's role would be the protection of the home and family's privacy, rather than enabling the intrusion. Further, this is not a §1983 suit, but rather a final challenge to the legislation and state court interpretation. Cohen v. Cowles Media Co., 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991). Further, the application of state rules of law in state court in the manner alleged to improperly restrict constitutionally reflected freedoms constitutes state action. Id.

There are exceptionally important policy grounds for this Court to grant certiorari. In these troubled times, there are serious temptations to erode the civil rights which constitute the genuine value of American citizenship. Without question, one of these core fundamental rights concerns individual privacy and the sanctity of the family home. While the government has legitimate concerns and requirements for authority in controlling foreign terrorist threats and seeking to assure the fundamental safety of the nation, there is great importance in reminding ourselves of the need to maintain powerful legal bulwarks so as to protect that which makes our nation unique, special and free. This case provides an opportunity for the nation's highest court to remind the country that our legal institutions maintain an absolute commitment to defend the freedom of the individual, to reaffirm fundamental privacy protections in a context that will not in any way compromise the government's ability to fulfill its defense obligations. A firm statement from this Court will give heart to those civil libertarians

who fear that the self-imposed erosion of cherished liberties threaten to grant victory to those who would chip away at the most positive attributes of our national way of life.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

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Phone: (724) 228-4885
Counsel for Petitioner

APPENDIX

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 31, 2002

Mr. Peter M. Suwak
Pete's Surplus Building
PO Box I
Washington, DC 15301

Re: Viola Medved
v. Workers' Compensation Appeal Board
Application No. 02A351

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on October 31, 2002, extended the time to and including January 5, 2003.
This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Ruth Jones
Assistant Clerk

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

VIOLA MEDVED,	:	No. 121 WAL 2002
Petitioner	:	Petition for Allowance of
	:	Appeal from the Order of
	:	the Commonwealth Court
v.	:	
	:	
WORKERS'COMPENS-	:	
ATION APPEAL BOARD	:	
(ALBERT GALLATIN	:	
SERVICES),	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 8th day of August, 2002, the Petition for Allowance of Appeal is DENIED.

A True Copy Patricia Honard
As of August 8, 2002
Attest: /s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viola Medved,	:	
Petitioner	:	
v.	:	No. 349 C.D. 2001
Workers' Compensation	:	
Appeal Board (Albert	:	
Gallatin Services),	:	
Respondent	:	

ORDER

NOW, January 28, 2002,. having considered petitioner's application for reargument and/or reconsideration, and respondent's answer, the application is denied.

BY THE COURT:

/s/ James Gardner Colins, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viola Medved,	:
Petitioner	:
v.	: No. 349 C.D. 2001
Workers' Compensation	: Argued: October 9, 2001
Appeal Board (Albert	:
Gallatin Services),	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge (P.)
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION BY
SENIOR JUDGE JIULIANTE FILED: November 28, 2001

Viola Medved (Claimant) petitions for review of the January 9, 2001 order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the modification petition filed by Albert Gallatin Services (Employer). The primary issue before us on appeal is whether the Board erred in determining that Employer met its burden of establishing that a position was available to Claimant under *Kachinski v. Workmen's Compensation Appeal Board (Vepco Constr. Co.)*, 516 Pa. 240, 532 A.2d 3 74 (1987), where Claimant would have to perform a telecommunications job from her

home and a telephone company would have to install a dedicated telephone line. We affirm.

On March 10, 1986, Claimant suffered a work-related injury to her back in the course of her employment as a registered nurse. Pursuant to a July 2, 1986 notice of compensation payable, Claimant received total disability benefits in the weekly amount of $260.15, based on an average weekly wage of $390.26. On April 2, 1988, the parties executed a supplemental agreement indicating that Claimant's benefits were suspended as of November 1, 1986 due to her return to work on that date at no loss of earnings. On May 12, 1990, when Claimant sustained another loss of earnings, she filed a reinstatement petition. She later withdrew that petition, however, on August 27, 1990.

Employer filed a modification/suspension petition on October 14, 1997, alleging that Claimant was capable of sedentary to light-duty work as of August 27, 1997, that Employer had located appropriate work for her through a vocational expert and that Claimant had failed to make a good-faith effort to secure that work. In a responsive answer, Claimant denied all material allegations.

In support of its petition, Employer presented the testimony of Leonard Felman, the vocational expert, Stacey Marchione, president of Smart Telecommunications, and Dr. Betsy Blazek-O'Neill, a physician board-certified in physical medicine and rehabilitation. On the basis of Mr. Felman's testimony, the WCJ found as follows with regard to the customer service surveyor position:

[T]he work involved would be telecommunications rather than telemarketing .... Telecommunicating, Mr. Felman stated, was considered low stress because it is business to business contact and not calling homes and trying to sell items. The job offered ... would be calling businesses within business hours to confirm names and addresses for Dunn & Bradstreet and confirming the operation of bar code machines in businesses. The only exception to the business to business rule would be calls that are placed on behalf of the American Heart Fund asking individuals to send letters to their neighbors asking them to contribute to the American Heart Fund. Mr. Felman testified that the claimant would be able to select some calling assignments that relate to topics in which she has an interest and would be able to vary her work schedule to accommodate any need she had to rest. Mr. Felman testified that the only time anyone would enter the claimant's home ... would be when the public telephone company, not Smart, would install a telephone line connection jack. A hands free portable telephone with a headset and lists and information would be sent to her home via UPS. The only monitoring performed by Smart would be to review the telephone bill for the separate line to verify that calls were placed for the telecommuting work. Mr. Felman testified that the claimant had contacted [the vocational rehabilitation company] twice by telephone and

> advised them that she had received their letters regarding this position with Smart. She stated she expected rent if she were to work at home but that she did not like telephone work and was declining the position.

(Finding of Fact "F.F." No. 6.)

In addition, Marchione, president of Smart, testified as follows regarding the position:

> The position involved verifying business names and addresses with no sales. The Smart employee would work from home using a dedicated telephone line installed by the telephone company exclusively for their [sic] work. The only monitoring performed by Smart of the claimant's performance would be a review of the telephone bill for the dedicated telephone line.

(F.F. 10.)

Finally, Employer's medical expert, Dr. Blazek-O'Neill, determined that Claimant had degenerative disc disease and degenerative joint disease in her lumbar spine, due in part to her 1986 work injury. She opined that Claimant was capable of sedentary and light forms of work. She reviewed the material regarding the proffered telecommunications position and opined that Claimant was capable of performing that type of work on a full-time basis as of the December 18, 1995 examination.

Claimant presented her testimony, that of her husband and that of two medical experts. Claimant testified that she was sixty-seven years old and received social security disability benefits. In addition, Claimant

stated that she did not feel that she could do the job mentally or physically and that she was neither trained for nor wanted to do that kind of work.

Claimant's husband testified that

> he did not want his wife to work out of their residence because he felt it was an invasion of his privacy. He was concerned that doing that kind of work in the couple's apartment would make the claimant nervous, upset and maybe unreasonable to get along with and would create a bad situation in their marriage. Mr. Medved stated that he was 68 years of agt and had been inarried to his wife for 45 years and they had always gotten along well together. Mr. Medved stated that he continued to work seven days a week operating barber shops and beauty shops. Mr. Medved did indicate that he would have no objections to his wife working if the telecommunications work could be done out of a storeroom which he was willing to rent to the telecommunications company.

(F.F. 5.)

Claimant's first medical expert, Dr. Nunziata Raschella, a family practice physician, indicated that Claimant had some legitimate low back pain, but made no mention of Claimant's abilities to perform any type of work or any degree of her disability. Claimant also offered the report of Ronald E. Novak, D.C., a chiropractor, who found that Claimant would have periodic exacerbation of pain, numbness and stiffness in

her left foot, leg, hip and in her spine. Ultimately, the WCJ granted Employer's modification petition, effective August 27, 1997, and dismissed its suspension petition. The WCJ concluded that the proffered telecommunications job was within Claimant's work- related physical limitations and that she offered no valid reasons for refusing to accept it. With regard to any physical limitations, the WCJ stated that she did not find credible Claimant's testimony that she could not do the job mentally or physically, finding to the contrary that Claimant's "mental ability was quite good as she demonstrated in her testimony." (F.F. 12.) Further, although the WCJ found no dispute between the deposition of Dr. Blazek-O'Neill and the reports of Claimant's medical experts, she determined that "[t]here is no dispute that the claimant has degenerative disease in her lumbar spine and that condition causes her pain and limits her working ability to sedentary or light duty work. Clearly the job of working in telecommunications from her home falls within that level of work." (F.F. 12.)

Moreover, the WCJ found Claimant's personal feelings about the proffered position to be irrelevant. The WCJ also rejected the concerns of Claimant and her husband regarding privacy, concluding that Mr. Felman and Ms. Marchione adequately addressed those concerns in their testimony.

The Board affirmed the WCJ's order, concluding that there was substantial, competent evidence to support the WCJ's finding that Claimant failed to present a valid reason for her failure to accept the proffered job. It reiterated the law that Claimant's personal feelings about

the job were irrelevant[1] and that Mr. Felman and Ms. Marchione addressed Claimant's privacy concerns. In addition, pointing out that it is within the province of the WCJ to accept or reject the testimony of any witness,[2] the Board noted that the WCJ rejected Claimant's testimony that she was not mentally or physically capable of performing the job.

Finally, the Board rejected Claimant's contention that Smart's failure to pay rent for the use of the home constituted a sufficient reason for Claimant to refuse the job. It noted that Smart would have paid Claimant $9.00 per hour to make the phone calls from her home and that she also would have received partial disability benefits based on the difference between her current and pre-injury wages. *See Dilkus v. Workmen's Compensation Appeal Board (John F. Martin & Sons)*, 543 Pa. 392, 671 A.2d 1135 (1996) (bad faith where claimant refused job with relatively low wages based on concerns over the costs of transportation where claimant would receive partial disability benefits to account for the difference in wages and travelling expenses.) Claimant's timely petition for review to this Court ensued.

In *Bussa v. Workers' Compensation Appeal Board (Giles & Ransome, Inc.)*, 777 A.2d 126 (Pa. Cmwlth. 2001), a7 recent case where this Court determined that

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[1] *Hendry v. Workmen's Compensation Appeal Board (Miller & Norford, Inc.)*, 577 A.2d 933 (Pa. Cmwlth. 1990).

[2] *Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck)*, 664 A.2d 703 (Pa. Cmwlth. 1995).

an at-home job was not actually available to a claimant, this Court reiterated the applicable law:

> Pursuant to *Kachinski*, the burden of proof is on the employer to show that the claimant's condition has changed and that the claimant has been referred to a then available job that he is capable of performing. The burden of proof then shifts to the claimant to demonstrate that he responded to the job offer in good faith. If the claimant does not exercise good faith, then his benefits can be modified.

Id. at 130 (citations omitted).

As for analyzing whether a job is actually available to a claimant, the Court in *Bussa* stated as follows:

> Under the second prong of *Kachinski*, the offered job is "actually available" only if it can be performed by the claimant, taking into consideration his physical limitations and restrictions, age, intellectual capacity, education, previous work experience and other relevant considerations. "Other relevant considerations have included non-medical factors such as the claimant's place of residence, the distance and duration of the claimant's commute, and the length of the workday. The *totality of the circumstances* approach should be used to determine whether a job is available and appropriate for a reasonable person in Claimant's position."

Id. (citations omitted).

In the present case, Claimant argues that the Board erred in determining that she had no valid reasons for refusing the telecommunications job, citing the potential employer's refusal to pay rent and the inconvenience to the household. She points out that Smart would have the benefit of not having to provide a normal workplace while at the same time requiring the use of home space for the job. Further, there would be a disruption and change of the home environment for the husband who would not otherwise be compensated. For example, he would be forced to hear her part of any conversations required by the job whereas in a normal job with an off-site workspace, no. such intrusion of privacy would occur.

Moreover, Claimant rejects the Board's conclusion that the testimony of Mr. Felman and Ms. Marchione adequately addressed the invasion of privacy concern. Claimant points out that, had she accepted the job, she would have been required to sign an agreement indicating that Smart would have reasonable and timely access to her home during business hours for purposes of installation or service of equipment and training or removal of equipment. That agreement further reserved to Smart the right to monitor usage of the equipment and services provided at the residence. (R.R. I 14-115a.) Thus, Claimant argues that the agreement required much more than the one installation visit Mr. Felman implied would be necessary.

Further, Claimant maintains that, even accepting all of the modifications offered to reduce the intrusion into her residence, the offered job would still require

several intrusions. At a minimum, these intrusions would include the permanent placement of equipment in her home and the repeated daily conversion of a portion of her home into commercial office use. She argues that, under established Pennsylvania law, no. one has the right to force a conversion of the use of one's private residence and that an owner has the right to the quiet enjoyment of his personal property. See *Houston v. Texaco, Inc.*, 538 A.2d 502 (Pa. Super. 1988) (law recognizes cause of action for inconvenience and discomfort caused by interference with another's peaceful possession of his real estate.)

In addition, Claimant rejects the Board's indirect reliance on *Dilkus* for the proposition that partial disability benefits could, in part, make up for the conversion of part of her home into a home office. She points out that the Court in *Dilkus* concluded that partial disability benefits could make up for the expenses associated with transportation to a job. It did not address the forced conversion of a portion of a claimant's own real estate.

Further, Claimant avers that an analysis of the proffered position indicates that it was not offered in good faith, but instead was an attempt to avoid paying compensation. She maintains that courts have gone so far as to approve mere "make-work" positions, but have never before held that a claimant must surrender the quiet enjoyment of his home without any form of compensation. She alleges that such a ruling would be contrary to the humanitarian purposes of the workers' compensation law. *Sell v. Workers' Compensation*

Appeal Board (LNP Eng'g), 771 A.2d 1246 (Pa. Cmwlth. 2001). She asserts that, at a minimum, *bona fide* job offers should require potential employers to provide an appropriate location for the proffered employment and that a bright-line should be drawn at the doorstep of the injured worker's home.

Finally, Claimant contends that the Board erred in finding that the job was within her mental and physical capabilities where her testimony and that of her doctors indicated that she suffers from continuing pain and discomfort. She points out that the WCJ found that there was no dispute between the parties' medical experts as to the lumbar disc degeneration diagnosis and that such a diagnosis should have precluded even sedentary work. Further, she alleges that the WCJ never addressed the issue of whether Claimant's claims of problems with her concentration had any merit. Claimant asserts that the WCJ's observation of her should not constitute a basis for disregarding her testimony regarding her mental endurance.

In response, Employer contends that the Board correctly determined that it met its burden of establishing that the telecommunications job was available to Claimant and within her physical capabilities. Employer acknowledges this Court's recent case of *Bussa*, where we found that an at-home job was not available to the claimant, but maintains that the factors in that case distinguish it from the present one. In *Bussa*, the Board affirmed the order of the WCJ granting the employer's modification petition based on the claimant's lack of good faith in rejecting a job offer that would have

required him to work at home from his own computer. This Court reversed the Board's order, concluding that the job was not actually available to the claimant. Relevant factors included the fact that the computer was located in an awkward position on top of an entertainment center in the bedroom and there was no other place in the apartment where it could be relocated. In addition, there was evidence that the claimant's wife had been sick and bedridden for several months.

Employer maintains that the Court in *Bussa* correctly considered the totality of circumstances in determining whether the job was actually available to the claimant. It further alleges, however, that even though a consideration of the totality of circumstances in *Bussa* led the Court to conclude that the at-home job was not available, the Court should reach the opposite result in the case before us. Employer points out that the present case does not involve a computer that must be located, but instead a hands-free portable telephone with a headset. Claimant would be free to move about, stand or sit wherever she was comfortable to do the work. In addition, Claimant's husband is mobile and involved in tending his businesses. Thus, Employer contends that the present case is distinguishable from *Bussa*.

Further, Employer rejects Claimant's contention that the telecommunications position is not a valid job merely because it must be performed from her home. Employer notes the growing number of Americans telecommuting on a daily basis. In addition, it points out that a "normal workplace" is not required for all legitimate employment.

Employer also rejects Claimant's argument that working from her home would violate her constitutional rights. It maintains that performing the telecommunications position from home would not constitute an enforced conversion of real estate because only a job is at issue, one that she is free to accept or reject. Similarly, it avers that the fact that a rejection would result in a decrease in workers' compensation benefits does not transform this matter into a constitutional case.

Further, Employer rejects Claimant's argument that the Board erred in finding that she was mentally and physically capable of doing the job. It points out that the WCJ found the testimony of Dr. Blazek-O'Neill in that regard to be credible. It notes that the testimony of a single medical expert may constitute a reasonable basis upon which a WCJ may arrive at a finding of fact, despite conflicting evidence. *Robertshaw Controls Co. v. Workers' Compensation Appeal Board (Raffensperger)*, 710 A.2d 1232 (Pa. Cmwlth. 1998).

In addition, Employer notes that neither of Claimant's medical experts even testified concerning Claimant's ability to perform any type of work in general or the telecommunications job in particular. Certainly, the WCJ was free to reject Claimant's testimony that she was mentally and physically incapable of doing the job. *See Walk v. Workmen's Compensation Appeal Board (U.S. Air, Inc.)*, 659 A.2d 645 (Pa. Cmwlth. 1995) (a claimant's subjective belief did not relieve her of the obligation to pursue a job referral in good faith.)

Also with regard to medical condition, Employer rejects Claimant's argument that it had to demonstrate an

actual change in medical condition before she was deemed fit for any employment. Employer points out that this Court dismissed that argument in *Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams)*, 568 A.2d 981 (Pa. Cmwlth. 1989).

Finally, Employer reiterates the law that a claimant's personal dislike for a position is irrelevant to a determination as to whether the job is actually available. *Hendry*. It points out that Claimant testified that she expressed to Mr. Felman that she did not like telemarketing and that she really did not care for telephone work. (December 12, 1997 Hearing, N.T. 9; R.R. 9a; February 27, 1998 Hearing, N.T. 11; R.R. 27a.) It notes Claimant's letter to the WCJ where she stated that she has never been a phone person, that such work makes her "nervous and depressed when people yell at me, call me names or hang up on me" and that her "past experience with tele-marketing [sic] people has always been disturbing." (Claimant's Exhibit 4; R.R. 116a.) Further, Claimant stated in that letter that she has "been a registered nurse all of my life because it is my chosen profession to help people not to lie to them, so as I'm sure you can see this would be in direct violation of all that I believe in." (*Id.*)

We have carefully considered the parties' arguments and agree with the Board that Claimant demonstrated a lack of good faith in failing to pursue the telecommunications position. In making this determination, we note that *Bussa* does not stand for the proposition that an at-home job can never be available to a claimant. As Employer notes, the totality of

circumstances must be considered in ascertaining whether an at-home position is available to a specific claimant. In the present case, factors that could be considered "other relevant considerations" indicate that the telecommunications job was actually available to Claimant. Unlike *Bussa,* there were no factors present in the case before us that would have prevented Claimant from performing the position from her home.

Accordingly, we affirm.

/s/_____
JESS JIULANTE, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Viola Medved,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 349 C.D. 2001
	:	
Workers' Compensation Appeal Board (Albert Gallatin Services),	:	Argued: October 9, 2001
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge (P.)
HONORABLE JESS S. JIULIANTE, Senior Judge

DISSENTING OPINION BY JUDGE PELLIGRINI FILED: November 28, 2001

I respectfully dissent because I disagree with the majority's holding that a position offered as a telephone customer surveyor performing work from home is suitable alternative employment under the standards set forth in *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 516 Pa. 240, 532 A.2d

374 (1987).[1] I recognize that a significant number of individuals work from their homes, but just because they choose to do so does not make at-home work suitable alternative employment. A significant number of individuals choose to commute great distances and work inordinate numbers of hours, but if proffered, we would not find this type of employment situation to be a suitable alternative. Unless a person had chosen to work at home prior to an injury, I would hold that any position that requires a claimant's residence to be commandeered and turned from a home into an employer's rent-free field office, thereby invading the claimant's privacy, intruding, without permission, into other household members' daily home lives and disrupting family life, can never be considered suitable alternative employment.

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[1] Pursuant to *Kachinski*, the burden of proof is on the employer to show that the claimant's condition has changed and that the claimant has been referred to a then-available job that he or she is capable of performing. The burden of proof then shifts to the claimant to demonstrate that he or she responded to the job offer in good faith. If the claimant does not exercise good faith, then his or her benefits can be modified. Id. at 252, 532 A.2d at 379.

Under the second prong of *Kachinski*, the offered job is "actually available" only if it can be performed by the claimant, taking into consideration his or her physical limitations and restrictions, age, intellectual capacity, education, previous work experience and other relevant considerations. Id. at 251, 532 A.2d at 379. "Other relevant considerations have included non-medical factors such as the claimant's place of residence, the distance and duration of the claimant's commute, and the length of the workday."

Accordingly, I respectfully dissent.

DAN PELLEGRINI, JUDGE

COMMONWEALTH OF PENNSYLVANIA
WORKERS' COMPENSATION APPEAL BOARD
HARRISBURG

VIOLA MEDVED
4724 TUSCARAWAS RD
BEAVER, PA 15009

vs.

ALBERT GALLATIN
SERVICES
42 ½ e. MAIN STREET
UNIONTOWN PA 15401

A99-1325
APPEAL BY
CLAIMANT
FROM ORDER OF
WC JUDGE
CERCONE
S.S. #204-22-5653

PITTSBURGH
JULY, 1999

AFFIRMED

****

OPINION

FLECK, COMMISSIONER

This matter is before the Workers' Compensation Appeal Board ("Board") on the Appeal of Viola Medved ("Claimant") from the Decision and Order of Workers' Compensation Judge ("Judge") Susan S. Cercone, granting the Modification Petition filed by Albert Gallatin Services ("Defendant") and dismissing Defendant's Suspension Petition. For the reasons stated below, we affirm.

A review of the record reveals that on March 10,

1986, Claimant sustained a back injury while in the course and scope of her employment with Defendant. Pursuant to a Notice of Compensation Payable dated July 2, 1986, Claimant received total disability benefits at the rate of $260.15 per week based on an average weekly wage of $390.26. On April 2, 1988, the parties executed a Supplemental Agreement indicating that Claimant's benefits were suspended on November 1, 1986, based upon her return to work at no loss of earnings on that date. On May 12, 1990, Claimant filed a Reinstatement Petition, but it was withdrawn at the request of the Claimant on August 27, 1990.

On October 14, 1997, Defendant filed a Modification/ Suspension Petition alleging that as of August 27, 1997, Claimant was capable of sedentary to light work and Defendant located appropriate work for Claimant through a vocational placement expert, but Claimant failed to make a good faith effort to secure that work. Claimant filed a responsive Answer denying the material allegations contained in the Petition.

After hearings, testimony and the receipt of evidence, the Judge issued a Decision and Order granting modification of Claimant's benefits as of August 27, 1997, and dismissing the Susp6nsion Petition. The Judge determined that the Job made available to Claimant through Defendant's vocational expert was within Claimant's work-related physical limitations and Claimant offered no valid reasons for refusing to accept the job (Finding of Fact 12 &

Conclusion of Law 2). This Appeal[1] by Claimant followed.

On Appeal, Claimant argues that there is no substantial, competent evidence to support the Judge's Finding that Defendant referred an available job to Claimant, which was within her mental and physical capabilities. Therefore, Claimant asserts that the Judge erred in concluding that Defendant met its burden of proof for a modification of Claimant's benefits as of August- 27, 1997.

The burden of proof in a modification petition is governed by the guidelines set forth by the Pennsylvania Supreme Court in Kachinski v. WCAB (Vepco

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[1] The Board's scope of review on appeal is limited to determining whether the Judge has committed an error of law and whether the factual findings necessary to support the decision are supported by substantial evidence. Bethenergy Mines Inc. v. WCAB (Skirpan), 531 Pa. 287, 612 A.2d 434 (1992). It is solely within the Judge's discretion to find fact, and, it the facts as found by the Judge rest on competent evidence, we may not disturb them. Universal Cyclops Steel Corp. v. WCAB (Krawczynski), 305 A.2d 757 (Pa. Cmwlth. 1973). The Judge is free to accept or reject, in whole or in part the testimony of any witness, including medical witnesses. Greenwich Collieries v. WCAB (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). Determinations of credibility and weight to be accorded evidence are the prerogative of the Judge, not this Board. Vols v. WCAB (Alperin, Inc.), 637 A.2d 711 (Pa. Cmwlth. 1994).

Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987).[2] Under Kachinski, an employer must establish that a claimant's condition has changed such that she is capable of returning to available work; for a job to be "available" to a claimant, the referrals must be within the physical capabilities related to the work injury, as specified by the medical witness whose testimony is accepted by the Judge. Nabisco v. WCAB (Kelly), 611 A.2d 352 (Pa. Cmwlth. 1992). It is enough that the employer produce medical evidence describing the claimant's capabilities, and vocational evidence classifying the job, e.g., whether it is light-duty work, sedentary work, etc., along with a basic description of the job in question. Kachinski, 516 Pa. at 251, 532 A.2d at 379. A position may be found to be actually available, or within the claimant's reach, only if it can be performed by the claimant, taking into

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[2] In Kachinski, the Supreme Court set forth the following procedure governing the modification of benefits when the injured claimant is able to return to work:

(1) The employer who seeks to modify a claimants benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change of condition;

(2) the employer must then produce evidence of a referral (or referrals) to a then-open job (or jobs), which fits in the occupational category for which the claimant has been given medical clearance, e.g., light duty, sedentary work, etc.;

(3) the claimant must then demonstrate that he has in good faith followed through on the job referral(s);

(4) it the referral fails to result in a job, then The claimant's benefits should continue.

Kachinski, 5 16 Pa. at 252, 632 A.2d at 380.

account her physical restrictions and limitations, her age, her intellectual capacity, her education, her previous work experience, and other relevant considerations, such as her place of residence. Id. From such evidence, however, it will be up to the Judge to determine whether the claimant can perform the job in question. Id.

Defendant presented the testimony of Betsy Blazek-O'Neill, M.D., who is board certified in physical medicine and rehabilitation, and examined Claimant on May 9, 1994 and December 18, 1995 (O'Neill, 7/23/98, depo. p. 6). Based upon her examinations and Claimant's history, Dk. O'Neill diagnosed Claimant with degenerative disc disease and degenerative joint disease in her lumbar spine contributed to, at least in part, by the 1986 work injury (O'Neill, pp. 9-10). Dr. O'Neill opined that Claimant was capable of performing sedentary and light forms of work (O'Neill, p. 10). Upon review of a job description for a customer service surveyor position, Dr. O'Neill specifically opined that Claimant was capable of performing that job, which was referred to her by Defendant (O'Neill, pp. 11-12).

Defendant also presented the testimony of its vocational placement expert, Leonard F. Felman (N.T., Felman 7/10/98, pp- 8-9). Mr. Felman testified that he conducted a vocational interview with Claimant, during which he found Claimant to have excellent communications skills and to be an overall excellent candidate for work, despite her indication that she had problems driving (N.T., 7/10/98, pp. 9-10). Mr. Felman testified that he located a customer service surveyor position for Claimant with Smart Telecommunications

("Smart"), which could be done from Claimant's home and required her to engage in business to business contact over the phone to gather certain information, but it involved no sales (N.T., 7/10/98, pp. 11-12). Mr. Felman stated that this job required Claimant to work 40 hours per week, but she could work Monday through Saturday between the hours of 9 am and 11 pm, so Claimant would have the opportunity to take substantial breaks during the course of her work (N.T. , 7/10/98, p. 25). Mr. Felman indicated that the only time anybody would have entered Claimant's home would have been when somebody from the telephone company installed a separate phone jack, and Claimant would receive all her work materials through the mail (N.T., 7/10/98, pp. 18-19). Mr. Felman indicated that Claimant's work would be monitored by review of the phone bill from the business line, as well as Claimant's paperwork, and that no one from Smart would ever enter Claimant's home (N.T., 7/10/98, pp. 19-20).

Defendant also presented the testimony of Smart's President, Stacy Marcione, (Marchione, 11/19/98, depo. p. 6). Ms. Marchione verified Mr. Felman's testimony regarding Claimant's jobdyties and that the position required no sales (Marchione, p. 7). Ms. Marchione also verified Mr. Felman's testimony regarding the method by which Claimant's work would have been monitored and that no one from Smart would have entered Claimant's home (Marchione, pp. 8-10).

Claimant testified that she injured her lower back in 1986 while working for Defendant as a registered nurse (N.T., Claimant, 12/12/97, pp. 7-10). Claimant

testified that she was offered a telemarketing job in August of 1997, which involved making telephone calls from her home (N.T., 12/12/97, pp. 9-10). Claimant stated that she declined the job offer because she did not care for telephone work and did not think her attention span would be good enough due to the pain and discomfort she experiences (N.T., 2/27/98, p. 11). Claimant stated that she did not feel she was mentally or physically capable of performing the job (N.T., 7/10/98, p. 34). Claimant indicated that she and her husband were concerned about their privacy and did not want people coming into their home to install and monitor equipment (N.T!, 2/27/98, p. 11)

Claimant's husband testified that he felt the offer to have Claimant work from their home was a total invasion of his privacy and security (N.T., 2/27/98, p. 13). Mr. Medved testified that he works seven days per week operating seven barber shops and beauty shops, and is in and out of his home during the day (N.T., 2/27/98, P. 16). Mr. Medved expressed a concern about jeopardizing the privacy and security of his home by having people come into his home to install and monitor equipment (N.T., 2/27/98, pp. 18-19).

Claimant submitted the reports of her treating family physician, Nunziata Raschella, M.D., and her treating chiropractor, Ronald E. Novak, D.C. (Exhibits C-1 & C-2). Dr. Raschella and Dr. Novak's reports both discussed the degenerative condition of Claimant's back and Claimant's complaints of pain, but neither of these reports made any mention of what, if any, were Claimant's work capabilities (Id.).

The Judge found that Dr. O'Neill's opinion that Claimant was capable of performing sedentary or light work was not disputed by .the medical evidence offered by Claimant (Finding of Fact 12). The Judge found that the testimony of Mr. Felman and Ms. Marchione addressed Claimant's concerns about privacy (Id). The Judge rejected Claimant's testimony that she was not capable of performing the telecommunications job either mentally or physically (Id.).

Having reviewed the record, we believe that there is substantial, competent evidence to support the Judge's Finding that work was made available to Claimant within her physical capabilities. Dr. O'Neill testified that Claimant was capable of sedentary to light work, and the testimony of Mr. Felman and Ms. Marchione established that the telecommunications job offered to Claimant was within that level of work. Therefore, the Judge did not err in concluding that Defendant met its burden of proof for a modification of Claimant's benefits as of August 27, 1997.

Claimant also argues that there is no substantial, competent evidence to support the Judge's Finding that Claimant offered no valid reason for refusing to accept the job offered to her by Smart. Therefore, Claimant contends that the Judge erred by .granting a modification of her benefits as of August 27, 1997.

The Kachinski requirement of good faith on the claimant's part is designed to ensure a claimant's cooperation in her own employment rehabilitation efforts. Bennett v. WCAB (Hartz Mountain Corp.), 632 A.2d 596, 600 (Pa. Cmwlth. 1993). As used in this

context, a claimant's lack of good faith does not denote overt malfeasance on the part of the claimant, but it is merely the characterization of the claimant's action for refusing to follow up on a job referral without a sufficient reason. Johnson v. WCAB (McCarter Transit, Inc.), 650 A.2d 1178 (Pa. Cmwlth. 1994). A claimant's personal dislike of a particular type of job does not constitute a sufficient reason for failing to follow through on a job referral. Hendry v. WCAB (Miller Norford, Inc.), 577 A.2d 933 (Pa. Cmwlth. 1990).

Having reviewed the record, we believe that there is substantial, competent evidence to support the Judge's Finding that Claimant failed to present a valid reason for her failure to accept the telecommunications job made available to her. The testimony of Mr. Felman and Ms. Marchione addressed Claimant's privacy concerns, and Claimant's personal feelings about the job were not relevant. Hendry, supra. Further, the Judge rejected Claimant's testimony that she was not mentally or physically capable of performing the job, and Claimant did not present any credible unequivocal medical evidence supporting her contentions. We are mindful that the Judge, as fact-finder, may accept or reject the testimony of any witness. See Greenwich Collieries, supra. Further, since credibility determinations are the sole authority of the Judge and are outside the Board's scope of review, we will not now review those determinations. Therefore, the Judge did not err by granting a modification of Claimant's benefits as of August 27, 1997.

Moreover, we reject Claimant's contention that

Smart's failure to pay Claimant and her husband rent for the use of their home constituted a sufficient reason for Claimant to refuse the job. Claimant would have been paid $9.00 per hour to make phone calls from her home. In addition Claimant would have received partial disability benefits based on the difference between her current and pre-injury wages, which would account for any rent payment's Claimant and her husband felt they were owed. See Dilkus v. WCAB (Martin & Sons), 671 A.2d. 1135 (Pa. Cmwlth. 1996) (claimant acted in bad faith by refusing to accept a referred-job ,based upon her concerns regarding the costs of transportation to the job and the relatively low wages of the job, because claimant would receive partial disability benefits to account for the difference in wages and traveling expenses).

Accordingly, we:

ORDER

Claimant's Appeal is **DENIED**. The Judge's Decision and Order granting Defendant's Modification Petition and dismissing the Suspension Petition is hereby **AFFIRMED**.

BY THE BOARD:

_____

Fleck, COMMISSIONER

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
BUREAU OF WORKERS' COMPENSATION

****

DECISION RENDERED COVER LETTER

Bureau Claim Number: 1227221
Social Security Number: 204-22-5653

Petitions:	Judge:
Pet to Mod Comp	Susan Cercone
Pet to Susp Comp	Sheffield Prof Bldg
	2020 Main Street
	Aliquippa PA 15001

VIOLA MEDVED
4724 TUSCARAWAS RD
BEAVER, PA 15009

vs.

ALBERT GALLATIN
SERVICES
2 ½ E MAIN STREET
UNIONTOWN PA 15401

HEARINGS:

12/12/97 - record taken
02/27/98 - record taken
05/08/98 - postponed - defendant's counsel
07/10/98 - record taken

CLAIMANT'S WITNESSES & EXHIBITS:

Viola Medved, claimant
Mr. Medved, spouse

1. Report of Nunziata Raschella, M.D.
2. Report of Ronald E. Novak, D.C.
3. Letter of claimant

EMPLOYER'S WITNESSES & EXHIBITS:

Leonard Felman, employment consultant
Expediter Corp.

A. Report of Betsy Blazek-O'Neill, M/D.
B. Job description
C. Letter of claimant
D. Report of surveillance of 12/24/97 to 01/0798 and video
E. Deposition of Betsy Blazek-O'Neill, M.D.
F. Deposition of Stacey Marchione

FINDINGS OF FACT

1. On October 8, 1997, the employer, Albert Gallatin Services, filed modification and suspension petitions against the claimant, Viola Medved, alleging that she was capable of sedentary to light duty work and the employer had located appropriate work, for her through a vocational expert, and lacking good faith, the claimant refused to make an effort to secure that work.

2. Bureau documents of record reflect that a notice of compensation payable was issued on July 2. 1986 acknowledging a work injury to claimant's back which occurred on March 10, 1986. Her weekly disability rate was set at $260.15 based on an average weekly wage of $390.20. A supplemental agreement of April 2, 1998 reflects that the claimant returned to work on November 1. 1986 with no loss of earning power and on that date her compensation was suspended. The claimant filed a petition to reinstate compensation benefits on May 12. 1990 but it was withdrawn at the request of the claimant on August 27, 1990.

3. At the first hearing held on December 12, 1997, the claimant appeared and testified that her time of injury occupation was as a registered nurse. The claimant testified that her injury was to her low back and that site had pain which ran across her buttocks and down into her left leg. She testified that she had not had surgery for tier back condition but had been hospitalized in 1986 and 1989. She testified that she was currently 67 years of age and was receiving social security disability. The claimant understood that site had been offered a telemarketing job which she could perform from her home. She stated that she did not want to perform that kind of work.

At a final hearing held on July 10, 1998 die claimant had an opportunity to hear the testimony of Leonard F. Felman who is an employment consultant doing business as Expediter Corp. Mr. Felman explained the nature of the telecommunication job and how the phone line would be set up in the claimant's house. After

hearing Mr. Felman's testimony, the claimant stated that she did not feel she could do the job mentally or physically. She stated that she was not trained to do that kind work.

4. By interlocutory order of July 13, 1998, the employer's request for supersedeas was granted and the claimant's compensation rate was modified based on the telecommunication's position which she did not accept. Based on the earning power of $360.00 which that job would have provided, the claimant's benefits were reduced to $20.17 per week.

5. The claimant's husband testified at a hearing held on February 27, 1998, that he did not want his wife to work out of their residence because he felt it was an invasion of his privacy. He was concerned that doing that kind of work in the couple's apartment would make the claimant nervous, upset and maybe unreasonable to get along with and would create a bad situation in their marriage. Mr. Medved stated that he was 68 years of age and had been married to his wife for 45 years and they had always gotten along well together. Mr. Medved stated that he continued to work seven days a week operating barber shops and beauty shops. Mr. Medved did indicate that lie would have no objections to his wife working if the telecommunications work could be done out of a storeroom which he was willing to rent to the telecommunications company.

6. Leonard Felman testified that Expediter Corp.

specialized in job evaluations, career guidance, job availability and accommodations for those with mental and physical disabilities. He testified that he conducted a vocational interview evaluation of the claimant and during that interview, she complained to him of having a problem driving and difficulty with pain. Mr. Felman found that the claimant had excellent communication skills and was an excellent candidate for work based on his understanding of the claimant's medical condition and the report of Dr. Betsy Blazek-O'Neill.

Mr. Felman testified that he had located a suitable position for the claimant as a customer service surveyor in telecommunications with a company named Smart Telecommunications (Smart). Mr. Felman testified that the work involved would be telecommunications rather than telemarketing, the latter of which is the sale of a service or product to someone. .Telecommunicating, Mr. Felman stated, was considered low stress because it is business to business contact and not calling homes and trying to sell items. The job offered the claimant would be calling businesses within business hours to confirm names and addresses for Dunn & Bradstreet and confirming the operation of bar code machines in businesses. The only exception to the business to business rule would be calls that are placed on behalf of tile American Heart Fund asking individuals to send letters to their neighbors asking them to contribute to the American Heart Fund. Mr. Felman testified that the claimant would be able to select some calling assignments that relate to topics in which she has an interest and would be able to vary her work schedule to

accommodate any need she had to rest. Mr. Felman testified that the only time anyone would enter the claimant's home in connection with the telecommuting job would be when the public telephone company, not Smart, would install a telephone line connection jack. A hands free portable telephone with a headset and lists and information would be sent to her home via UPS. The only monitoring performed by Smart would be to review the telephone bill for the separate line to verify that calls were placed for the telecommuting work. Mr. Felman testified that tile claimant had contacted Expediter twice by telephone and advised them that she had received their letters regarding this position with Smart. She stated she expected rent if she were to work at home but that she did not like telephone work, and was declining tile position.

Following the testimony of Mr. Felman, I asked the claimant if she would be interested in the telecommunication's position with the understanding that it did not involve selling or the physical presence of Smart in her home. Both the claimant and her husband again pointed to their concerns about privacy and the payment of rent and the claimant declined the job.

7. The employer offered the deposition testimony of Betsy Blazek-O'Neill, M.D., who is board certified in physical medicine and rehabilitation. Dr. Blazek-O'Neill examined the claimant on May 9, 1994 and on December 18, 1995 on behalf of the employer. Based on her examination Dr. Blazek-O'Neill determined that the claimant had degenerative disc disease and degenerative

joint disease in her lumbar spine, contributed to at least in part by the 1986 work injury. Dr. Blazek-O'Naill stated that the claimant was capable of sedentary and light forms of work. She reviewed the materials provided on the telecommunication services job to which the claimant was directed and found that the claimant was capable of performing this type of work as of the December 18, 1995 examination. She felt that claimant could perform such work on a full time basis.

8. The claimant offered file January 6, 1998 report of Nunziata Raschella, M.D., a family practice physician working at the Family Practice Center where claimant had been going since 1992. Dr. Raschella's report reflects that she had first seen the claimant in October 1997 but that other physicians in her practice had seen the claimant for back pain. Claimant's complaints to Dr, Raschella in October 1997 were limited to low back pain. Dr. Raschella's examination of the claimant in October 1997 reflected some decreased sensations to pin prick and light touch in stocking glove distribution, but the doctor noted that the claimant had a history of diabetes and these symptoms could be due to her diabetes. Dr. Raschella's report noted that the claimant did have legitimate low back pain but she was unable to take the typical non-steroidal anti-inflammatories because of a history of upper GI bleeding. Dr. Raschella report made no mention of the claimant's abilities to perform any type of work or any degree of disability.

9. The claimant also offered the report of Ronald E.

Novak. D.C. who diagnosed the claimant with chronic low back syndrome, severe multilevel lumbar disc degeneration with spondylosis and lumbar stenosis with leg and foot paresthesia. He found that the claimant would have periodic exacerbation of pain, numbness and stiffness in her left foot, leg, hip and in her spine.

10. The employer offered the telephone deposition of Stacey Marchione who testified that she was the president of Smart Corp., an agency that provides telecommunication services to corporations. She testified that in August 1997 the customer service surveyor position was made available to the claimant at a rate of pay of $9.00 per hour for a 40 hour week. The position involved verifying business names and addresses with no sales. The Smart employee would work from home using a dedicated telephone title installed by the telephone company exclusively for their work. The only monitoring performed by Smart of the claimant's performance would be a review of the telephone bill for the dedicated telephone line.

11. The employer offered a video of surveillance of the claimant's activities on December 24, 1997 and January 7, 1998. It offered no insights that had any bearing on the decision reached in this case.

12. After reviewing the entire record I find that there is no dispute between Dr. Blazek-O'Neill's deposition and the reports authored by the claimant's physician. There is no dispute that the claimant has degenerative disease in

her lumbar spine and that condition causes her pain and limits her working ability to sedentary or light duty work. Clearly the job of working in telecommunications from her home falls within that level of work. Claimant's only objection to the job was some concern about privacy which was addressed in the testimony of both Mr. Felman and Ms. Marchione. The claimant really offered no valid reason for refusing to accept the job which was offered to her by Smart Corp. Her own personal feelings about this job which was made available to her are not relevant. I did not find claimant credible when she stated she could not do the job mentally or physically. Her mental ability was quite good as she demonstrated in her testimony. The limited physical demands of the telecommunication work are well within her physical restrictions.

CONCLUSIONS OF LAW

1. At all the times the parties were bound by the Pennsylvania Woerkers' Compensation Act, as amended.

2. The employer has met its burden of proving that work within the claimant's mental and physical capabilities was offered to her and she did not in good faith pursue that job offer which would have paid her a weekly wage of $360.00.

ORDER

AND NOW, this 6th day of April 1999, the

modification petition is **GRANTED** effective August 27, 1997 and the claimant's weekly compensation benefit is reduced to $20.17. The suspension is **DISMISSED**.

_____

Susan S. Cercone
Worker's Compensation Judge

SSC/jjm

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

VIOLA MEDVED,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 349 C.D. 2001
	:	
WORKMEN'S COMPENSATION APPEAL BOARD,	:	
	:	
	:	
Respondent.	:	

PETITION FOR REVIEW

AND NOW, this 8th day of February, 2001, comes Petitioner, Viola Medved, by and through his Counsel, Peter M. Suwak, Esquire, who appeals the Opinion and Order of the Workmen's Compensation Appeal Board, dated 1/09/2001, based upon the following:

1. Jurisdiction lies with the Commonwealth Court for this appeal pursuant to 42 Pa. C.S.A. §763.
2. The party seeking review is Viola Medved.
3. Respondent government agency is the Workmen's Compensation Appeal Board. Commissioner Daniel R. Fleck made the decision in this matter, concurred in by Commissioners William J.

Atkinson, Susan McDermott, Robert T. McIntyre, Herbert W. Hoffman, and Joseph P. Santone.

4. Albert Gallatin Services, Uniontown, Pennsylvania is the employer of Petitioner Viola Medved.

5. The Opinion and Order sought to be reviewed is the Order dated January 9, 2001, granting Defendant's Modification Petition and dismissing the Suspension Petition by Workers' Compensation Judge Susan S. Cercone.

6. Petitioner Viola Medved objects to the Order on the following grounds:

a. The Board erred in affirming the Workers' Compensation Judge's finding that the employer had met its burden of proving that work within claimant's mental and physical capabilities had been offered to her where the alleged job offer required her to make use of her home for work purposes without rent or compensation and would cause disruption of her husband's quiet enjoyment of his home.

b. The Board erred in affirming the Workers' Compensation Judge's decision which failed to find that the offer of a "job" to a woman totally disabled for 13 years without offering rent or other compensation for disruption of the household and with the knowledge that little or no work would be accomplished was a sham and merely a punitive effort to harass the claimant as a

condition of recovering benefits.

c. The Board erred in affirming the Workers' Compensation Judge's finding that the employer had met its burden of proving that work within claimant's mental and physical capabilities when it had been demonstrated that she had continuing pain and discomfort resulting in a limited concentration span incompatible with the job requirements.

d. The Board erred in affirming the Workers' Compensation Judge's Finding of Fact No. 6 since that finding was in error and not supported by substantial evidence and omitted from the summary of the Claimant's testimony that she did not feel she could perform the job because her attention span would not be good with the pain and uncomfortable feelings she has.

e. The Board erred in affirming the Workers' Compensation Judge's Finding of Fact No. 12 since that finding was in error and not supported by substantial evidence since:

> 1) the Judge's finding that there was no dispute between the claimant's expert reports and the opinion of the company's expert was error since there was no opinion by the claimant's physician that she could perform the work offered or that

claimant was capable of sedentary or light duty work.

2) the Judge made no findings concerning the ability to do the offered work in light of the limited concentration span caused by the claimant's pain.

3) the Judge erred in finding that claimant's only objection to the offered position was a concern for privacy and that she offered no valid reason for refusing the job when in fact she had voiced her belief that she could not perform the job because of her limited concentration due to her chronic pain and discomfort.

7. Petitioner requests this Honorable Court to reverse the decision of the Board, deny the modification petition and direct compensation payable to the claimant for total disability appropriately with back compensation for the supersedeas period, and/or alternatively, a remand for hearing.

WHEREFORE, Petitioner requests this Petition for Review be granted.

Respectfully submitted,

Peter M. Suwak, Esquire
Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-1052

In The

Supreme Court of the United States

VIOLA MEDVED,

Petitioner,

vs.

WORKERS' COMPENSATION APPEAL BOARD (ALBERT GALLATIN SERVICES),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a constitutional right to privacy issue was presented to the courts of Pennsylvania and thus appropriately preserved for review by this court?

2. Whether the Petitioner's claim fails to present a valid constitutional issue in the absence of state action?

3. Whether the Petitioner's claim presents a valid constitutional issue in any event?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Procedural History

Albert Gallatin Services (hereinafter "Albert Gallatin" or "Employer") filed a petition with the Pennsylvania Bureau of Workers' Compensation seeking to modify or suspend the payment of workers' compensation benefits to its former employee, Viola Medved (hereinafter "Petitioner"), on the basis of her refusal to accept employment involving sedentary work that she was capable of performing. Albert Gallatin alleged that it had located appropriate work for Petitioner through the efforts of a vocational placement expert, but that she had refused to make a good faith effort to secure that work.

The Bureau of Workers' Compensation assigned the Employer's petition to Workers' Compensation Judge Susan Cercone, who held several hearings on the matter. The Employer introduced testimony from Dr. Betsy Blazek-O'Neil concerning the Petitioner's physical capabilities. It also presented testimony from Leonard Felman, a vocational expert, and Stacey Marchione, President of Smart Telecommunications, the entity with whom the Employer had found Petitioner a suitable job. Finally, the Employer submitted documentary evidence concerning a telecommunications job located for Petitioner in August of 1997 with Smart Telecommunications and a handwritten note from the Petitioner, dated August 14, 1997, stating that she did not want the position.

The Petitioner testified on her own behalf. In addition, her husband testified as to his concerns and opinions regarding the proffered job. Petitioner submitted reports

from Dr. Novak and Dr. Blank, as well as a letter she wrote to the Judge outlining her reasons for refusing the position with Smart Telecommunications.

On April 7, 1999, Judge Cercone circulated a decision granting the Employer's Modification Petition but dismissing the Suspension Petition. The Judge found as fact that the Petitioner had degenerative disease in her lumbar spine and that this condition caused her pain, limiting her to sedentary or light duty work. The Judge further found as fact that the proffered job in telecommunications fell within that level of work. Judge Cercone did not find the Petitioner credible when she stated she could not perform the job, mentally or physically. Instead, the Judge accepted as credible the medical testimony of Dr. Blazek-O'Neil on the issue of Petitioner's physical capabilities. The Judge also found credible the testimony offered by the Respondent Employer as to the propriety of the job offered to Petitioner. Therefore, the Judge found that the Employer had met its burden of proving that work within the Petitioner's capabilities had been offered to her and that she had not, in good faith, pursued that job offer.

Petitioner appealed to the Workers' Compensation Appeal Board, which affirmed the decision of the Workers' Compensation Judge.

Petitioner then sought review by the Commonwealth Court of Pennsylvania, arguing (1) that the Workers' Compensation Appeal Board had erred in finding that the Employer had met its burden of proving that work within the Petitioner's physical and mental capabilities had been offered to her; (2) that the Board had erred in failing to find that the job offered to the Petitioner, without offering rent, was a sham; and (3) that the Board had erred in

finding that the Employer had met its burden of proof that work within the Petitioner's physical and mental capabilities was available when Petitioner had testified that she had continuing pain and discomfort.

Petitioner raised no allegations of a violation of a constitutional right to privacy or any other issue arising under the United States Constitution. The Commonwealth Court rejected Petitioner's arguments and affirmed the Board's decision. Petitioner's subsequent Application for Reargument and/or Reconsideration was denied following review by the Court *en banc*.

Petitioner then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which denied the said petition.

The instant Petition for Writ of Certiorari followed.

Factual History

The Petitioner sustained a work-related injury in 1986 when she experienced "a pulling or cracking" in her back which "ran across" her buttocks and into her left leg and foot. (R. 8a)[1] She had been working as a registered nurse at the time. (R. 11a) A "Notice of Compensation Payable" was issued, dated March 10, 1986. (R. 7a)

Almost ten years later, on December 18, 1995, the Petitioner submitted to an independent medical

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[1] References to the Reproduced Record filed with the Commonwealth Court of Pennsylvania will be made as follows: (R. _a.). References to the Supplemental Reproduced Record filed with the Commonwealth Court of Pennsylvania will be made as follows: (R. _b.).

evaluation by Dr. Betsy Blazek-O'Neil. Based upon her examination of the Petitioner and the history as provided to her by the Petitioner, Dr. Blazek-O'Neil opined that the Petitioner had "degenerative disc disease and degenerative joint disease in her lumbar spine contributed to at least, in part, by the 1986 work injury." She further opined that the Petitioner was capable of sedentary to light forms of work. (R. 97a-98a)

On August 6, 1997, the Petitioner submitted to a vocational interview with Leonard Felman, an employment consultant with Expeditor Corporation. (R. 52a, 55a) Mr. Felman was aware of the physical limitations placed upon the Petitioner by Dr. Blazek-O'Neil. (R. 56a) Given the information he had learned from the vocational interview, and based upon Dr. Blazek-O'Neil's restrictions, Mr. Felman located a suitable job for the Petitioner. (R. 57a)

That job was with Smart Telecommunications, Inc. as a "customer service surveyor in telecommunications." (R. 57a) Mr. Felman sent a letter to the Petitioner informing her of the opportunity with Smart Telecommunications and giving her the parameters of the position, the pay, the hours and the physical requirements. (R. 66a, 20b-24b) Telecommuting, as opposed to telemarketing, is a means by which information is exchanged between businesses. Individuals are not contacted at their residences. No selling is involved. (R. 57a) To enable Petitioner to perform the job, the *public telephone company* (not the Employer) would install a separate telephone line in the Petitioner's home, which would be totally dedicated to her work. (R. 64a) She would then receive a hands-free portable telephone with a headset via UPS, plus lists and information to be used in her work. (R. 64a-65a)

The Petitioner called Mr. Palmer's office to decline the position, stating that if she were to take the position, her husband wanted rent for the use of their property as a commercial establishment. She was told that the job offer was an opportunity to work from her home, for which she would be compensated, but that rent would not be paid. The Petitioner then stated that she did not care for telephone work, did not have the attention span for it, and would not accept the position. (R. 69a)

Stacey Marchione, the President of Smart Telecommunications, confirmed that the proffered position had been accurately described in Mr. Palmer's letter to the Petitioner and that the job was available at the rate of $9.00 per hour, forty hours per week. (R. 6b-12b) Ms. Marchione also testified that Petitioner had not completed the job application sent to her and that, therefore, the interview that had been scheduled for Petitioner had never occurred. (R. 12b)

Both Mr. Palmer and Ms. Marchione testified that no one from Smart Telecommunications would enter the Petitioner's home and that the only time anyone would need to enter her home would be when the *public telephone company* installed a separate telephone line. (R. 64a-65a, 8b-9b)

Mr. Medved, the Petitioner's husband, also testified. He stated that he viewed the proffered job as a total invasion of his privacy and security. (R. 29a) Mr. Medved also expressed the opinion that doing this type of job in their apartment would make his wife nervous, upset, and perhaps unreasonable to get along with, to the detriment of the couple's 45-year marriage. (R. 29a-30a) Mr. Medved, himself, runs seven businesses and is in and out of his

home throughout the course of the day. (R. 31a) Although he agreed that the petitioner could make the requisite calls while he was out on business, he objected to the offer because "they [Employer] didn't want to pay any rent for her space" and questioned the legitimacy of the job. (R. 33a) Mr. Medved also voiced the following concerns about Petitioner's potential employer:

> I feel it's a con . . . they are going to run phone lines through my house. They will know every piece of my apartment. They could plant cameras . . . [or] bugs in my house . . . I say I don't want it in my apartment because they are invading my privacy . . . they don't state when they are going to come. . . . I don't want them in there at all. It's my home. It's not their office. They are not paying rent. I have a storeroom that I will rent to them. (R. 34a-35a)

The Petitioner offered medical reports from Dr. Novak and Dr. Raschella in support of her contention that she was unable to perform the telemarketing position; however, those reports did not include any opinions which conflicted with those of Dr. Blazek-O'Neil. Neither physician commented on the Petitioner's work capacity and neither stated that she was incapable of sedentary to light duty work.

Judge Cercone found, therefore, that Petitioner had not pursued the telecommunications job offer in good faith and granted the Employer's Modification Petition.

In summary, the Judge found that the Employer had established, through the testimony of Dr. Blazek-O'Neil, that the Petitioner had the ability to work in a sedentary to light duty capacity. Through the testimony of Mr. Felman and Ms. Marchione, the Employer established

that the Petitioner had been referred to a position within her physical restrictions which had been open and available. The Petitioner failed to establish that she had acted in good faith in declining the referred employment. Consequently, the Judge modified the Petitioner's benefits in accordance with the applicable standards set forth in *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 316 Pa. 240, 532 A.2d 374 (1987).

The constitutionality of the Pennsylvania Workers' Compensation Act, which is the Act pursuant to which the Petitioner's benefits were modified, was not challenged below. In fact, the Act has recently been held to be constitutional in the cases of *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999) and *Pennsylvania AFL-CIO, et al. v. Commonwealth of Pennsylvania*, 563 Pa. 108, 757 A.2d 917 (2000).

REASONS FOR DENYING THE WRIT

1. Petitioner did not preserve her constitutional claims in the courts below.

The Petition for Writ of Certiorari in this case lists the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution under the heading, "Constitutional Provisions and Statutes Involved." Significantly, however, Petitioner makes no further reference to any of these provisions. Moreover, a review of the record in this case reveals only a passing reference to the Fourth Amendment in a discussion which Petitioner included verbatim in these filings in the court below, and no mention whatsoever of any other constitutional amendment or federal statute. The sole mention of

federal constitutional issues in the court below appears in the following passage, which appears in the Brief for Appellant which Petitioner filed in the Commonwealth Court of Pennsylvania:

> "The Appeal Board cites the case of *Dilkus v. WCAB*, 671 A.2d 1135 (Pa., 1996) for the proposition that partial disability payments may, in part, make up for the expenses associated with transportation to a job. However, neither this case nor any case ever dealt with the enforced conversion of a portion of the claimant's own real estate. Constitutional privacy concerns as well as expressed state tort policy militate against this result. Additionally, not even the government may cross the threshold into a man's private residence without a warrant establishing probable cause as determined by a neutral judicial officer. U.S. Constitution Amendment IV."

Petitioner's "Brief for Petitioner" filed with the Commonwealth Court of Pennsylvania, p. 14; "Petitioner's Application for Reargument and/or Reconsideration" filed with the Commonwealth Court of Pennsylvania, p. 4; "Petition for Allowance of Appeal" filed with the Supreme Court of Pennsylvania, p. 14.

In short, other than the above-cited mention of the Fourth Amendment in connection with warrantless searches, which are not at issue in this case, Petitioner raised no constitutional or other federal issues in the courts below. Like the petitioner in *Adams v. Robertson*, 520 U.S. 83 (1997), the Petitioner in the case at bar has failed to carry her burden of showing that the claims she raises here were properly presented to the court below. Accordingly, under the reasoning set forth by this Court in

Adams, *supra*, her Petition for Writ of Certiorari must be dismissed.

2. Petitioner's claim does not present a valid constitutional issue inasmuch as no state action is involved.

Even if Petitioner had preserved objections to the denial of her workers' compensation benefits based upon the Third, Fourth, Fifth and Ninth Amendments to the United States Constitution in the courts below, such arguments would be devoid of merit and, hence, not proper subjects for review by this Court. In this regard, the protections afforded by the First, Third, Fourth, Fifth, and Ninth Amendments, as applied to the states by the Fourteenth Amendment, apply only to "state action."

The case of *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999), cited by petitioner, explains why the actions of Albert Gallatin, a private employer, acting through its workers' compensation insurance carrier, do not constitute "state action" cognizable on constitutional grounds pursuant to the Fourteenth Amendment. In *Sullivan*, this Court held that the acts of a private insurer in exercising its right to request independent utilization review of a claimant's injuries before paying workers' compensation benefits did not constitute "state action."

In so holding, the Court reiterated the following two-pronged test for determining whether a private party's conduct constitutes "state action":

> . . . state action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by

> a rule of conduct imposed by the State or by a person for whom the State is responsible," *and* that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

526 U.S. at 51 (emphasis Court's, citations omitted). The opinion in *Sullivan, supra*, held that the insurer had acted "with the knowledge of and pursuant to" a state statute, thus satisfying the first prong of the above-cited criterion. The Court proceeded to conclude, however, that the insurer did not become a "state actor," and, hence, meet the second prong of the Court's "state action" test, merely by invoking its procedural rights under a state statute. In this regard, the Court cited its prior decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1998) for the proposition that "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action." (See also, *Sullivan v. Barnett*, 913 F.Supp. 895 (E.D. Pa. 1996), which holds that Pennsylvania workers' compensation insurers are not rendered "state actors" by the fact that the procedural scheme under which they operate is, itself, a product of state legislation.)

Contrary to Petitioner's argument in the instant case, the principles enumerated by the Court in *Sullivan, supra*, mandate the denial of her Petition for Writ of Certiorari. In fact, the relationship between the alleged acts of the Employer and any conceivable "state action" is, if anything, more attenuated in the instant case than it was in *Sullivan, supra*. In that case, the conduct alleged to be "state action" was specifically authorized by an amendment to the Pennsylvania Workers' Compensation Act. In the instant case, the Petitioner neither has cited, nor can cite, any provision of the Pennsylvania Workers' Compensation Act which

either sanctions or prohibits employers from the practice of seeking to discontinue workers' compensation benefits to partially disabled workers who refuse to accept appropriate employment which requires them to work out of their homes. The silence of the Act on this issue clearly indicates "a legislative decision not to interfere in a dispute between an insurer and an employee . . . " (*Sullivan, supra*, at p. 51) over whether that employee has refused employment for which she is reasonably suited.

Like the decision of the insurer in *Sullivan*, the decision of the Employer in the case at bar to seek reduction of the Petitioner's workers' compensation benefits because she refused in-home employment cannot be attributed to the state. Rather, this decision, like that of the insurer in *Sullivan*, " 'turns on . . . judgments made by private parties' without 'standards . . . established by the state.' " *Id.* at 52.

Simply stated, there is no state action in this case. The constitutional right to privacy protects against incursions by the government and persons acting as government agents and has little force against a private employer. *Johnson v. Carpenter Technology Corp.*, 723 F.Supp. 180 (D. Conn. 1989). Here, the action complained of consisted of the installation of a dedicated telephone line in Petitioner's home by the public telephone company. Only the bills for calls made on that telephone line were to be monitored by Smart Telecommunications to determine if the Petitioner was making the calls required of her as a telecommuter. No one from the Employer or Smart Telecommunications would enter the Petitioner's home at any time.

3. Petitioner's claim does not present a valid constitutional issue in any event.

Petitioner argues at length that the job offered to her would have constituted an "invasion of privacy," a "disruption of her quiet home" and a "forced conversion of the use of one's private residence." As such, she is alleging a deprivation of her property rights. The Petitioner, however, fails to recognize that no one has forced her to accept in-home employment. Rather, as set forth above, the Employer has merely exercised its right to seek a reduction of her workers' compensation benefits by the amount she could have been expected to earn from the proffered in-home employment. Hence, what Petitioner is really alleging is a deprivation of workers' compensation benefits. However, Petitioner's "right" to workers' compensation benefits is not a constitutional right, but rather, is an entitlement afforded her by the Pennsylvania Workers' Compensation Act. The constitutional right to privacy applies only to "fundamental rights" and workers' compensation is not such a right. *See e.g., McCusker v. Workmen's Compensation Appeal Board (Rushton Mining Company)*, 536 Pa. 380, 639 A.2d 776 (1994).

The Pennsylvania Workers' Compensation Act and the case law interpreting it, such as *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 532 A.2d 374 (Pa. 1987), clearly require an injured employee to accept the proffered position if it is within his or her physical capabilities. This is a condition of eligibility for workers' compensation benefits under the statute. The only sanction, should the employee elect not to accept the position, is a suspension or modification of his or her workers' compensation benefits. As set forth above, workers' compensation benefits are an *entitlement*, not a *right*.

No one forced the Petitioner to accept the in-home job. In fact, she did not accept it. Her benefits were, therefore, modified in accordance with the Workers' Compensation Act. She was not required to "waive her protected right to the quiet enjoyment of her own residence" or to "waive the rights of her family members to the same entitlement." To the contrary, the Petitioner was offered a job and an opportunity to have gainful employment. She chose to reject the position because she did not like it and because she wanted rent in addition to her wages. Presumably, she also chose to reject the position because her husband objected to it. In any case, by failing to accept the position, she was not seeking to enforce her "right" to privacy, but rather was waiving her "entitlement" to workers' compensation benefits.

In her brief, the Petitioner cites to cases such as *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (right to privacy implicated in decision whether or not to terminate a pregnancy), *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy), and other milestone cases involving fundamental rights. These cases are not applicable to the case at hand. No fundamental right is at issue. This case involves merely the Petitioner's entitlement to workers' compensation benefits.

The Pennsylvania Workers' Compensation Act does not seek to regulate home or family, but merely delineates the conditions under which an individual is entitled to workers' compensation benefits. Under Pennsylvania law, an injured employee is not entitled to receive total disability workers' compensation benefits if it is shown that he or she is capable of performing work which is then open and

available. *Kachinski, supra*. Here, the judge found as fact that the Petitioner was physically capable of performing the telecommuter position, a position that was open and available to her should she choose to accept it. The only ramification of her failure to accept it was a modification of her entitlement to workers' compensation benefits. There was no forced intrusion into the Petitioner's privacy.

CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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